Case No: 2303584/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE K ANDREWS**
MEMBERS:	**Ms J Beard** **Mr P English**

BETWEEN:

Mr R Brackstone

Claimant

and

Beck Interiors Limited

Respondent

ON:	**17-20 November 2020** **8 & 9 December 2020 in chambers**

Appearances:
For the Claimant: **Miss A Meredith, Counsel**
For the Respondent: **Mr C Quin, Counsel**

RESERVED LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that:

1. the claimant was unfairly constructively dismissed;

2. the respondent did not directly discriminate against the claimant but did discriminate against him arising from his disability and breached the duty to make reasonable adjustments; and

3. the respondent did not breach the claimant's contract of employment with respect to notice pay but did in respect of payment of bonus.

REASONS

1. In this matter the claimant complains that he was unfairly dismissed, either expressly or constructively, discriminated against in various ways due to his disability (the fact of which was established at an earlier hearing) and that he is owed sums of money in respect of both his notice period and bonuses. The agreed list of issues is appended to this Judgment.

Evidence & Submissions

2. We heard evidence from the claimant and, for the respondent, from:
   a. Mr C Galloway, Group Managing Director;
   b. Mr R Smith, Construction Director; and
   c. Mr J Dart, Group Financial Director.

3. We had an agreed bundle of documents and two (regrettably unagreed) chronologies to assist us. Counsel for both parties submitted written arguments together with oral submissions.

4. The hearing was conducted by video link due to the current pandemic. I am grateful to all parties and witnesses for their patience in dealing with the various relatively minor technological issues that arose from time to time. I am satisfied that despite those issues it was possible to have a fair hearing. Both because of the manner of the hearing and adjustments for the claimant, we took more breaks than would be usual during an in-person hearing.

Relevant Law

5. **Unfair dismissal.** In order to bring a complaint of unfair dismissal it is first necessary to establish that the claimant has in fact been dismissed.

6. If there is no express dismissal then the claimant needs to establish a constructive dismissal. Section 95(1) of the Employment Rights Act 1996 (the 1996 Act) states than an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:

   > "(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

7. In Western Excavating (ECC) Limited v Sharpe ([1978] ICR 221), the Court of Appeal confirmed that the correct approach when considering whether there has been a constructive dismissal is that:

   > "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct, he is constructively dismissed."

8. If an employee has been dismissed, constructively or expressly, then it is

for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

9. If the Tribunal finds that a dismissal was unfair, it is open to it to reduce any compensatory award to reflect that the employee may have still been dismissed had the employer acted fairly (known as a Polkey reduction following Polkey v AE Dayton Services Limited [1988] ICR 142). In reaching its conclusion, the Tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so. Furthermore, the enquiry is directed at what the particular employer would have done, not what a hypothetical fair employer would have done (Hill v Governing Body of Great Tey Primary School [2013] ICR 691, EAT.)

10. Further it is open to the Tribunal to reduce compensation if it is just and equitable to do so having regard to any blameworthy conduct of the claimant that contributed to the dismissal to any extent. This reduction can apply to both the basic and compensatory awards (section 122(2) and section 123(6) of the 1996 Act.) This is an issue for the Tribunal to decide on the balance of probabilities from the evidence it has heard and is separate to the consideration of whether the dismissal was unfair.

11. In order to justify a specific reduction, the Tribunal has to find:
    a. culpable or blameworthy conduct of the claimant in connection with the unfair dismissal;
    b. that that conduct caused or contributed to the unfair dismissal to some extent;
    c. that it is just and equitable to make the reduction.
    (Nelson v BBC (no 2) [1979] IRLR 346)

12. **Direct disability discrimination**: section 13 of the Equality Act 2010 (the 2010 Act) provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. The protected characteristic need not be the only reason for the treatment but must be a significant influence, i.e. more than trivial, and the alleged discriminator's motive is irrelevant. Disability is a protected characteristic (section 4).

13. To answer whether treatment was 'because of' the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he/she was. The EHRC Code of Practice on Employment (2011), a guide to the proper application of the 2010 Act states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.

14. It is a matter for the Tribunal to determine what amounts to less favourable treatment interpreting it in a commonsense way and based on what a

reasonable person might find to be detrimental.

15. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The circumstances include a person's abilities if the protected characteristic is disability.

16. Direct discrimination is rarely blatant. Notwithstanding the burden of proof provisions referred to below, it is acknowledged that it is usually not easy for a claimant to establish that discrimination has taken place. It is rare for there to be an overt discriminatory act. That is why we look carefully at all the evidence and are willing to draw inferences where appropriate.

17. **Discrimination arising from disability:** section 15 of the 2010 Act states:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> >
> > (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

No comparator is needed.

18. The EHRC Code advises that there must be a connection between whatever led to the unfavourable treatment and the disability. Further that the 'consequences' of disability include anything which is the result, effect or outcome of the disability. It also sets out guidance on the objective justification test.

19. The Court of Appeal decision in City of York Council v Grossett ([2018] EWCA Civ 1105) confirms that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? and (ii) did that 'something' arise in consequence of B's disability.

20. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The meaning of 'unfavourable' in section 15 was considered in Trustees of Swansea University pension & Assurance Scheme & anor v Williams ([2015] IRLR 885) and described as having 'the sense of placing a hurdle in front of, or creating a particular difficulty for, the or disadvantaging a person…'.

21. The second issue is an objective matter; whether there is a causal link between B's disability and the relevant 'something'. It also confirmed that there is no requirement that A be aware that the 'something' has occurred in consequence of B's disability.

22. In Baldeh v Churches Housing Association of Dudley District Limited (UKEAT/0290/18/JOJ) the EAT confirmed it is sufficient for the 'something arising in consequence' of the disability to have a 'significant influence' on the unfavourable treatment. The fact that there may have been other causes as well is not an answer to the claim.

23. In Risby v LB of Waltham Forest (UKEAT/0318/15), the EAT had previously confirmed that only a loose connection is required between the 'something' and the unfavourable treatment.

24. In Grossett, the Court also considered the defence available to employers at section 15(1)(b). They confirmed that the test under that provision is an objective one according to which the Tribunal must make its own assessment.

25. The role of the ET in assessing the employer's justification for the purposes of section 15(1)(b) was considered by Singh J in Hensman v MoD (UKEAT/0067/14), who observed that:

> '43. … the role of the Employment Tribunal in assessing proportionality … is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the Tribunal itself.
>
> 44. … the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer. …'

26. Singh J had drawn assistance from the earlier guidance provided by the Court of Appeal in Hardy and Hansons plc v Lax ([2005] ICR 1565), where Pill LJ stated:

> '31. … It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate.'

27. **Breach of the duty to make reasonable adjustments:** section 20 and schedule 8(20) of the 2010 Act set out the duty to make adjustments. If an employer applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial (again, more than minor or trivial) disadvantage in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10).

28. PCP is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions. It has been confirmed however in Ishola v TFL ([2020] EWCA Civ 112) that PCP carries the connotation of a state of affairs indicating how

similar cases are generally treated or how a similar case would be treated if it occurred again and although a one-off decision or act can be a practice, it is not necessarily one.

29. Interpreting the duty does not contain a strict causation test but requires a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability. If so, the test whether it was reasonable to make a particular adjustment is an objective question for the Tribunal to answer (Tarbuck v Sainsbury's Supermarkets 2006 UKEAT).

30. **Knowledge of disability:** a respondent will only be liable for disability discrimination if it had actual or constructive knowledge at the material time that the claimant was disabled. This is an issue for the Tribunal to determine based on its findings of fact and must be answered by considering the individual decision maker(s) not the organisation as a whole. The burden of proof lies on the employer to show it did not have constructive knowledge.

31. **Burden of proof:** the provisions regarding burden of proof are at section 136 of the 2010 Act which, in summary, are that if there are facts from which the Court could decide in the absence of any other explanation that the claimant has been discriminated against, then the Court must find that that discrimination has happened unless the respondent shows the contrary.

32. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). A simple difference in status and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed.

33. At the first stage the Tribunal has to make findings of primary fact. It is for the claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. At this stage the outcome will usually depend on what inferences it is proper to draw from those primary facts. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test. At this stage the Tribunal does not have to reach a definitive determination. The Tribunal must assume that there is no adequate explanation for those facts. It is appropriate to make findings based on the evidence from both the claimant and the respondent, save for any evidence that would constitute evidence of an explanation for the treatment.

34. If the Tribunal is satisfied that there is evidence to suggest that there was an act of unlawful discrimination, the burden of proof shifts to the respondent. To discharge that burden the respondent must prove, on the balance of probabilities, that they did not commit such an act. The Tribunal

is entitled to expect cogent evidence to discharge that burden because the facts necessary to prove an explanation will normally be in the possession of the respondent.

35. **Breach of contract:** the Tribunal has jurisdiction to consider claims of breach of a contract of employment (e.g. unpaid notice/bonus) where that claim arises or is outstanding on termination of the employee's employment. Such claims are determined by reference to usual principles of contract law.

Findings of Fact

36. Having assessed all the evidence, both oral and written, and the submissions we find on the balance of probabilities the following to be the relevant facts.

37. The respondent specialises in interior fit outs in the hotel, museum, retail, leisure and residential sectors. It has approximately 200 employees. Each sector is led by a board director. The relevant board director for the residential team is Mr Carvalho who reports to Mr Galloway. The work of the respondent is project-based with the composition and size of team working on each flexing according to project size. Mr Galloway is clearly a very hands on MD who has a strong management style that is applied throughout the business.

38. The respondent also has Project Commercial Directors (PCD) who are not board directors but are responsible for one or more large contracts with a team of Commercial Managers working for them. They liaise with the client directly and the partners from the client's professional teams. There was a dispute between the parties as to the exact scope of the role but it is clear that PCDs are very senior within the organisation, are paid accordingly and have a wide-ranging and demanding job. A Senior Commercial Manager (SCM) is usually solely responsible for the financial and contractual aspects of a smaller contract and, according to the project, may have a more junior commercial manager working with them.

39. The respondent has a non-contractual employee staff handbook which includes an equal opportunities policy of the type one would expect to see in an organisation of this size together with a capability procedure aimed at ensuring employees maintain satisfactory performance standards and to encourage improvement where necessary. There is nothing on the face of that procedure to indicate that it does not apply to director level employees although Mr Dart's evidence was that in practice it is not appropriate to put such an employee through a performance process. Mr Dart has internal responsibility for HR matters but he confirmed that he has had no formal HR training nor any training on disability although he is familiar with the process for engaging the respondent's occupational health service as he deals with any referrals.

40. In any event the capability procedure provides for informal discussions in the first instance followed by formal steps in more serious cases to clarify the required standards, identify areas of concern, establish the likely causes

of poor performance and any training needs and/or set targets for improvement and a timescale for review. It states that consideration will be given to whether poor performance may be related to a disability and if so whether there are reasonable adjustments that could be made. Ultimately the procedure provides for a range of possible outcomes including dismissal, final warning and redeployment at the same or a lower grade. There is a right of appeal against any outcome.

41. The claimant commenced employment with the respondent as a SCM on 24 May 2016 in the residential sector team on a salary of £85,000 subject to 3 months' notice. He worked initially on the respondent's Bedford Square project. His line manager was Mr Galloway but he also reported to Mr Smith the project director.

42. The claimant's service agreement said in respect of bonuses:

> 9.1 The Company may in its absolute discretion pay the Employee a bonus of such amount, at such intervals and subject to such conditions as the Company may in its absolute discretion determine from time to time or taking into account specific performance targets, to be notified to the Employee or as agreed between the Employee and the Company from time to time. The Company may alter the terms of any bonus targets or withdraw them altogether at any time without prior notice.
>
> 9.2 Any bonus payment to the Employee shall be purely discretionary and shall not form part of the Employee's contractual remuneration under this agreement. If the Company makes a bonus payment to the Employee in respect of a particular financial year at the Company, it shall not be obliged to make subsequent bonus payments in respect of subsequent financial years of the Company.
>
> 9.3 Notwithstanding clause 9.1, the Employee shall in any event have no right to a bonus or a time-apportioned bonus if his employment terminates for any reason or he is under notice of termination [whether given by the Employee or the Company] at or before the date when a bonus might otherwise have been payable.

43. In September 2016 following a review the claimant's annual salary was increased by £5,000. In November 2016 the claimant gave notice of resignation to the respondent which they accepted. The claimant's case is that his reason for the resignation was that he was very dissatisfied with the way the Bedford Square project was being run. Mr Galloway's understanding was that the claimant's reason was he had obtained a more lucrative role elsewhere. We prefer the claimant's evidence on this point. He is better placed to tell us his motivations for his resignation and it is clear therefore that at the least the claimant had concerns about the project and his role from an early stage.

44. Following discussions with Mr Vaughton, the then CEO, agreement was reached that the claimant would remain at the respondent and that he would be promoted to PCD with effect from 1 January 2017 on a new service agreement with materially the same terms as his previous contract except for an improved basic salary of £105,000 and increased benefits, the company bonus scheme and a personal bonus in relation to Bedford Square. That scheme was set out in a letter dated 12 December 2016 which stated:

‘Following the current progression and recent discussion on 42 Bedford Square, we wish to confirm a special personal incentive and bonus scheme for you related to profitability and delivery of a quality and successful project which as you know is extremely important to the company.

Based on being an employee for the conclusion of the project in all aspects and on achieving the following a bonus payment will be due:

- On achieving on or above £l .2M profit, a lump sum gross bonus of £10,000 will be paid by the company.
- Achieve a margin of over £l .5M. the lump sum gross bonus shall be increased to £15,000.
- Thereafter with every addition of every £100,000 profit gained over and above £l .5M. a further £3,000 gross bonus payment will be added for each.

We are pleased to clarify the above on the successful practical completion, all snagging defect signed off whilst achieving the highest level of quality and agreement and being in receipt of final monies bar retention and without dispute.

We would like to thank you for showing your commitment, focus and support and look forward to achieving the successful completion of the project.’

45. There were a number of issues with the Bedford Square project. The claimant and Mr Galloway had very different views as to where responsibility lay for that. It is not the role of this Tribunal to form a view on that although it is apparent that there were times at which relationships within the team became very strained and on occasion Mr Galloway, as he admitted, lost his temper and used inappropriate language and tone of voice when addressing the claimant. It is also apparent that, whether they were right or not, members of the respondent management team formed the view that the claimant had some difficulties in a number of areas including communication and team working. Equally it is clear that the claimant was working very hard and very long hours in 2017 and Mr Galloway in his evidence confirmed that in some respects the claimant did a very good job. In particular he secured a good financial outcome in respect of Bedford Square.

46. In July 2017 the Bedford Square site work was suspended although the claimant continued to work on the project until he was moved to another project, Cheval.

47. An end of year appraisal session was held between the claimant and Mr Galloway and Mr Smith on 18 December 2017. In anticipation of that the claimant completed his self-assessment form which can be broadly categorised as positive but he also identified that he:

‘become too caught up in detail due to business necessity and own tendency’

and in the section concerning recommendations for improvement/goals for the next year he said:

‘to avoid becoming embroiled in detail… To let go a bit and focus more on the bigger picture… To have time to contribute more widely. To improve my work/life balance…’

48. The evidence of Mr Galloway and Mr Smith was that during the session their view of the claimant's failings were pointed out to him in particular with regard to a failure to recruit, poor communication and poor teamwork. They said that he had an opportunity to respond but he did not engage, appeared not to be listening and was not taking on board their comments. The claimant's evidence was that the meeting consisted of Mr Galloway 'complaining and ranting at me for about an hour' and in his oral evidence characterised it as a 'moaning session'. He said that he tried to put his side of the story but was cut off and spoken over and that in order to avoid further confrontation and distress he sat, virtually silent, for the remainder of the meeting.

49. Although Mr Galloway made some brief handwritten notes on the claimant's self-assessment form which to some extent support his evidence, and in particular refer to a review in three months, those notes were not copied to the claimant and there was no formal completion of the form or the process. In addition there was no formal notification to the claimant of concerns about his performance nor any formal notification of an intended future review. Completion of formal process was clearly not a priority for Mr Galloway but it is clear that he did raise significant performance issues with the claimant.

50. On 22 December 2017 the claimant was diagnosed with acute exacerbation of an acute generalised anxiety disorder (GAD) characterised by a distressing sense of worry. He was referred to Dr Kimber-Rogal for cognitive analytic therapy. She provided a report in February 2019 for the preliminary hearing on disability in this Tribunal. The claimant's diagnosis came at the end of a year in which not only had he been working particularly hard but he had also had a number of very distressing events in his personal and family life. The claimant did not inform the respondent of the diagnosis at the time.

51. In early April 2018 the client on Cheval expressed dissatisfaction with the claimant and requested his removal from its site. On 6 April 2018 the respondent's contract on the Bedford Square project was terminated by that client. On 10 April Mr Galloway emailed the claimant asking him to complete or hand over all outstanding tasks on Cheval by the following day so that he could then be redeployed to work on the preparation of the Bedford Square final account.

52. On 12 April Mr Galloway wrote to the claimant in a letter headed 'performance issues'. This letter had been shared in draft with Mr Bishop and Mr Hutchison. In reply Mr Bishop referred to this being a necessary pre-emptive move as others at the client were dissatisfied with the claimant. The letter said:

> 'It is with regret that I find myself having to write to you formally detailing our disappointment and frustration over your lack at engagement and performance over the recent weeks. I wish to keep this simple and clear as I believe you have struggled to digest and follow not only mine but other board directors' instructions specifically in relation to Bedford Square and the Cheval project.

With regards to Bedford Square you have been asked on several occasions to make a payment to Boon and this remains outstanding. this has weakened our position with them as a contractor and this is extremely concerning given our weakened position on this project with the recent termination at our contact with our client. I also refer to my email sent Tuesday 10th April (attached).

With regards to Cheval, it is extremely disappointing to hear we have received negative feedback by the client in relation to the outstanding lift pit recommendation. Why this has taken so long is beyond comprehension. In order to give you the opportunity to rectify the situation I would again ask that you are permanently based at HQ with immediate effect taking direct and sole instruction from Robert Bishop our Board Commercial Director.

It has been decided that due to recent events you will not be reinstated on the Cheval project and we will look at what other current and potential projects you can be reassigned to. Reassignment will only happen once the Bedford Square contract has been concluded to a satisfactory outcome.'

53. Following receipt of that letter the claimant made notes of his position on the lift pit issue. Even though these were not sent to the respondent at any time they do show that he had his own view on that issue and was noting it in anticipation of having chance to explain his position at some point.

54. At the claimant's request Mr Galloway met the claimant on 17 April 2018 together with Mr Dart who prepared notes that were later shared and agreed with the claimant. At this meeting the claimant disclosed his GAD diagnosis. The respondent accepts that from this point they had knowledge of his disability. The claimant says that they had that knowledge from earlier conversations he and Mr Smith had had when they discussed his mental health problems. There is nothing to suggest however that those conversations were of sufficient detail that would be necessary to establish constructive knowledge of a mental health problem such as to amount to corporate knowledge of disability especially as at the time the claimant was not taking any time off sick or raising any flags in any other way that he was struggling. We find therefore that the respondent only had knowledge of the disability from 17 April 2018.

55. On 11 May 2018 the claimant notified Mr Galloway and others of his intended schedule of counselling appointments running from 14 May to 3 July and that he expected the last appointment to be a wrap-up meeting although that was 'subject to change'.

56. On 5 June 2018 agreement was reached between the respondent and its client on the final account for Bedford Square. Mr Galloway confirmed this outcome to the claimant and others by email in which he said:

   'Well done to [the claimant]… for preparing the [final account]… Let's hope we don't have to do another of its kind any time too soon…'

   As confirmed by the respondent's witnesses, the final result achieved by the claimant for the respondent in respect of this project was a very good one.

57. On 7 June 2018, at the claimant's prompting and in the absence of Mr Galloway who he had first sought to meet, a catch-up meeting took place

between him and Mr Dart. Mr Dart's note of their conversation, which the claimant accepts as accurate, reads:

> 'RB came to see me. He thanked Beck for supporting him in attending his counselling sessions. He reckons he is about halfway through and has to wait to see what the recommendations are. I suggested that he still spend too much time at his desk late into the evening and needs to break the pattern a bit. Generally he appeared to be in better position than when he last talked to us.'

58. The claimant and Mr Galloway then met on 18 June 2018. No notes were made but the claimant's own email on 5 July 2018 states that Mr Galloway clearly stated at that meeting that following his return from holiday they would have a further meeting which would be a thorough review including the annual appraisal and the 12 April letter, clearly indicating that performance was still being discussed.

59. On 28 June 2018 the claimant emailed Mr Galloway and Mr Dart with a list of his further proposed counselling sessions running from 2 July to 28 August.

60. At a meeting on 13 July 2018 between Mr Galloway, Mr Dart and the claimant Mr Galloway told the claimant that he had done a great job on the Bedford Square contract and confirmed that the bonus 'would now be payable as per [the claimant's] letter' in the sum of £24,000. As far as the claimant's health was concerned, he said he was pleased that he was continuing to attend regular counselling sessions but as the end date was uncertain it was better to have a conversation now rather than put it off.

61. Mr Galloway also said that the claimant's job title would change from PCD to SCM 'to meet the role that [the claimant] had actually been performing at' and that his salary would be reviewed. The claimant expressed the view that there were other factors behind his performance and that he did not agree with all the contents of the April letter. Mr Galloway stood by that letter but reiterated that he was keen for the claimant to succeed at the respondent and would work with him, if he wanted, to produce a plan for his future.

62. Following that meeting the claimant's prepared a proposal for a new role for himself reporting direct to Mr Galloway together with a draft internal announcement about such an appointment. He gave these to Mr Galloway on the morning of 20 July 2018.

63. Later on the same day Mr Galloway wrote to the claimant informing him that with immediate effect his title would change from Commercial Director to SCM with a salary reduction to £92,500. He also said that if the claimant wished again to pursue a director role in the coming months then they would gladly consider that and to set out and agree a progression plan. He referred to the claimant's proposal for a new role and said this would be digested and that they would look to meet and discuss that in the coming weeks. He again acknowledged the claimant's hard work on Bedford Square and confirmed the bonus of £24,000 would be paid in August.

64. The claimant was inevitably disappointed to receive that letter and in a conversation with Mr Smith on 25 July 2018 with reference to the planned meeting with Mr Galloway the following day he said that the respondent could not impose such a contractual change on him and that he was ready to leave the respondent if no agreement could be achieved. The claimant had, not unreasonably, taken legal advice regarding his position at or around this date. On the evening of 25 July and at 12.54 on 26 July, the claimant emailed a number of business documents to his personal email address.

65. At a meeting between the claimant and Mr Galloway at 13.30 on 26 July 2018, diarised as a 'catch up' although Mr Galloway said it was to discuss the claimant's proposal, the claimant expressed his concern about the demotion letter. There is a difference in account between the claimant and Mr Galloway as to their tone and approach. Each accuses the other of being angry and aggressive whilst maintaining that they were the reasonable and constructive one. Without any corroborating evidence of either account (other than that included in the later exchange of letters between solicitors acting for both parties - see below) we cannot conclude who is the more accurate but we find that both gentlemen were likely to have been assertive in putting their position forward.

66. Both agree that claimant referred to having taken legal advice and that his solicitor would be writing to the respondent. In that context Mr Galloway said something about whether the claimant wanted to leave the respondent. He said it was in the sense of 'do you really want to leave when you have the opportunity to do well' whereas the claimant's evidence was he said it in the sense of 'he believed the claimant did not want to work for the respondent' and that if he wanted to 'go that way' he should. We note that in the letter written by the respondent's solicitors on 30 July, they stated that Mr Galloway did ask the claimant in this meeting if he wanted to continue to work for them.

67. The meeting ended and the claimant went to leave. As he was standing at the door, the claimant's account is that he said he was disappointed it had come to this and Mr Galloway shouted at him:

   'I don't know why you are even still here….get out'

   which the claimant interpreted as summary termination of his employment (although he acknowledged that he did not believe Mr Galloway had called the meeting with the intention of dismissing him). Mr Galloway's account is that he thought the claimant had left, started reading documents, looked up after a short while. saw he was still there and said 'are you still here' and the claimant walked off.

68. After the meeting claimant spoke to Mr Smith and said words to the effect of 'that's that' shook hands and said goodbye. He also left a voicemail for Mr Dart as follows:

'Jonathan, hi, Richard Brackstone. I came looking for you in the office but obviously you are out somewhere. Wanted to speak to you face to face but obviously couldn't do so.

To let you know that Chris and I have had a conversation which hasn't gone well and consequently he told me to leave the premises so that is what I have done. And you unfortunately will be hearing from my solicitors over the matter. I am disappointed that it has come to this but unfortunately the company has left me no option, particularly given the conversation that has just taken place, so I would have preferred to speak to you face to face but not going to so have to leave you a voicemail. Take care.'

69. On the same day at 14.05 a clearly pre-prepared detailed letter was sent to the respondent from solicitors acting for claimant. Although that letter refers to contemplation of a constructive dismissal claim and states that the claimant would not agree to any change in his terms and conditions of employment nor any demotion, it is written in terms that show the claimant still regarded himself as employed although was open to an amicable settlement.

70. On the following day the claimant's solicitors wrote again referring to the conduct of Mr Galloway during the meeting on 26 July and the withdrawal of the claimant's access to the IT system (which the respondent had, quite reasonably in all the circumstances, done as a precautionary measure when he had not returned to work). They alleged that this amounted to an express dismissal.

71. On 30 July solicitors acting for the respondent wrote to the claimant's solicitors. In that letter they repeated that the reason for the claimant's demotion was a downturn in work and was not predicated on any concerns about his performance. They referred to and enclosed a letter drafted by Mr Galloway to the claimant on 27 July, written they said before receipt of the claimant's solicitor's letter of the same date, which proposed to retract the demotion and start a redundancy consultation process. The claimant was invited to return to work and engage in the consultation process. In these circumstances, although this letter did include a retraction of the demotion it was perfectly understandable that the terms of the letter hardened the position between the parties and made it almost impossible for the claimant to return to work in any meaningful way.

72. Mr Galloway's proposed letter of 27 July was clearly drafted with the benefit of legal advice. It expressed regret that the claimant's unhappiness at his proposed reversion to his previous role. It also stated that upon reflection it was apparent that he had not, as the respondent had thought he did, understood the compelling business reasons for the move and that therefore the letter of 20 July was retracted and that he should continue in his commercial director role retaining his remuneration package whilst the business case was assessed further. It went on to say that as the respondent had not won any new residential projects in the previous year there was no sustainable business case for retaining a commercial director role, that the residential sector was under review and that therefore the claimant's current role was at risk of redundancy. It invited him to a formal consultation meeting on 6 August with a representative in order to discuss

the situation and that one possible way forward was for him to return to the SCM role.

73. In all the circumstances this and the letter of 30 July were, at the least, disingenuous. Even taking into account that matters were moving at speed and the solicitors advising the respondent may well have only recently been instructed, it is perfectly apparent that redundancy was not the reason behind the demotion of the claimant. It was entirely due to the respondent's performance concerns. Furthermore, even if that approach was agreed in some haste, it is apparent that the respondent was maintaining the fiction that redundancy was the reason for the demotion as late as the preliminary hearing on 10 January 2019 and it was referred to as a potentially fair reason for the dismissal in the list of issues for this Hearing.

74. Mr Dart wrote to the claimant on 31 July 2018, again clearly with the benefit of legal advice. He invited him again to a consultation meeting on 2 August with a view to consultation about the situation as well as giving him an opportunity to present his grievance. The letter also stated that it was hoped that as a result of that meeting they would quickly identify whether or not he was staying with the business but if he did not attend then the respondent would conclude that he left the business with effect from 26 July.

75. In addition to a continuing exchange of correspondence between the two firms of solicitors, the claimant replied personally to Mr Dart on 1 August. That letter said:

> 'I refer to your letter of 31 July 2018, delivered by hand to my house late yesterday afternoon, in which you claim to have concern that I have "apparently instructed my solicitors that I was dismissed by Chris last week" and you assert this not to be the case. However, I cannot see what other conclusion you expect me to have drawn in the circumstances.
>
> As you know, I received a letter from Chris on the 20th July 2018 informing me that I had been demoted from my Project Commercial Director role to that of Senior Commercial Manager, along with a pay cut of £12,500. I had throughout our discussions on 13th July stated that I did not agree to any change to my employment, however the company insisted on making this unilateral change to my terms of employment.
>
> I was invited to a meeting last Thursday afternoon to discuss starting work in the role of Senior Commercial Manager. During this meeting, between Chris and myself, I remained calm, clear and rational throughout and restated to Chris that I was not prepared to accept a demotion and that it was in breach of my contract of employment. Chris became increasingly irate as the meeting progressed. He refused to reconsider the demotion, stating that the decision was made and he would not change his mind.
>
> As the meeting was drawing to a conclusion, I was attempting to explain to Chris how genuinely disappointed I was by the situation, by the fact that we hadn't been able to resolve matters (given that he was intent on ploughing his own course regardless) and that relationships had broken down to such an extent. At this point Chris interrupted me and shouted at me "Richard, I don't know why you are even still here, get out!".
>
> In light of recent events and the nature of the conversation which had just passed between us, I took this to clearly mean that my employment with Beck was at that moment terminated. An understanding that was quite reasonable in the circumstances. Particularly

after his repeated shouting at me of "do you want to work for Beck" prior to yelling at me to "get out".

For the record, at no stage prior to or after the above meeting, did I tell any colleague that I was leaving the company voluntarily.

You state that you have taken into account my evident unhappiness with the company's proposal to change me back to a Senior Commercial Manager. Of course, you, Chris and I, all know this to simply not be the case; and this is clearly supported by the correspondence and contemporaneous documents.

Let us be quite clear, this was not and never had been a 'proposal' or 'an offer'. It had from the outset been a fait accompli and one which, both you and Chris, had reiterated to me on a number of occasions. Despite my repeated assertions that I did not accept it or agree with it.

Chris had also reiterated this position to a number of colleagues within the business who have, in turn, reiterated the same to me.

You both informed me of your intention to change my job title to Senior Commercial Manager and to reduce my salary; by £12,500.00. You did so at least twice verbally and then confirmed the same in writing twice.

For the avoidance of doubt, I confirm that such action was entirely without my agreement and was in no way accepted by me.

You already have clarification as to my view of my employment status, it has been provided by my solicitors. However, for absolute clarity let me restate it again. It is my opinion that Chris summarily and unfairly determined my employment at the end of our meeting last week, and then reaffirmed this by having me excluded from the company's IT systems the following morning.

As the company appear to dispute this, I am now, for the avoidance of doubt, writing to confirm my resignation in response to the untenable position that the company placed me in, when it changed my terms of employment without my consent and which breaches my contract of employment, and, further, following Chris Galloways unreasonable conduct and behaviour in our meeting on the 26th July 2108.'

76. Mr Dart replied to the claimant the following day as follows:

'**Your Resignation**

Thank you for your letter of 1st August 20l8 confirming your decision to resign. We shall deem your resignation effective with immediate effect from yesterday, 1st August 2018 ("Termination Date").

Whilst we are very disappointed you did not utilise the company's grievance procedure in relation to the issues you were unhappy about: and you declined to engage in the consultation we offered you, to include attendance at a consultation hearing today, we do have to accept your resignation. …

Contractual Payments to be made to you up to the Termination Date

Given that you resigned with immediate effect, you will be paid at your normal Commercial Director remuneration up to the Termination Date. …

Decision not to make you a bonus payment

Although you had been designated for a bonus payment, the Company has exercised its discretion and decided that no bonus payment is payable to you. This is not just because your employment has terminated in advance of the payment date, which would automatically disqualify you for payment of the bonus pursuant to clause 9.3 of your contract of employment.

The additional reasons for the decision that you are not eligible for a bonus are as follows:

(1) You did not utilise the company's grievance procedure in seeking to resolve your unhappiness at the company's move to change your role. You disregarded the grievance procedure and our invitation to you to attend consultation in favour of resigning your employment. You disregarded the fact that Mr Galloway retracted the decision to move you to the Senior Commercial Manager role and confirmed you would continue as Commercial Director on your existing terms. It is evident from your solicitors' correspondence that you are seeking legal redress when our expectation of you. particularly as a senior manager would have been to allow the company the opportunity to resolve this with you internally, at least at first instance.

(2) The company is now being put to unnecessary legal expense owing to your decision not to engage in our grievance and consultation procedures.

(3) Your departure from the business last Thursday without any reference to any of your managers and without following any leave procedures has been disruptive and unprofessional.

(3) *(sic)* You have willfully misrepresented the dialogue between yourself and Mr Galloway at your meeting together last Thursday. It is simply untrue to suggest that you considered yourself to have been dismissed from employment by Mr Galloway at this meeting. It is admitted that Mr Galloway did ask you "Are you still here?" when he looked up from his desk some minutes after he had understood you had left his room of your own volition and he had busied himself in reading incoming correspondence. He looked up from his desk and was surprised to see you hovering in the doorway and so asked "Are you still here?". In no way could this reasonably be construed as Mr Galloway communicating to you that your employment was terminated summarily.

(4) One of the items on the agenda for the meeting between you and Mr Galloway of 26th July was discussion of your proposal for a new role with reference to your proposal document entitled "Commercial Best Practice and Risk Management, evolving a role aimed at long term improvement". The fact that Mr Galloway had made time to discuss this with you completely undermines your allegation that there was no consultation with you concerning your future role in the business. It is just unfortunate that the demands you made at the outset of that meeting meant that it was not feasible to enter into meaningful consultation with you about that proposal at that time. The fact you produced this document supports the fact you were aware that owing to the residential sector winning no new work, there was no sustainable role for you as a Commercial Director within the residential sector. …

It is extremely regrettable that your employment has terminated in this way. You have provided a valuable contribution during your employment and we wish you well going forwards.'

77. The claimant replied to that letter on 2 August and on 7 August his solicitors wrote to the respondent's solicitors. In neither letter was there any challenge to Mr Dart's statement that the respondent was treating the claimant's resignation as having immediate effect and that his salary would cease on 1 August.

Conclusions

78. It is useful to deal with the matters raised in the list of issues by starting with the claimant's alleged dismissal, then contractual matters and finally the discrimination claims.

79. Unfair dismissal

80. Express: Even on the claimant's account of what was said by Mr Galloway (and his acknowledgement that Mr Galloway had not gone into the meeting intending to dismiss) we do not conclude that that was an express dismissal. The words 'I don't know why you are even still here….get out' are ambiguous. They could clearly mean, and are more likely to mean, 'get out of my office' rather than 'get out of the building, you are dismissed'. Mr Galloway strikes us as the kind of manager who, if he intended to dismiss someone summarily on the spot, would have no difficulty in making that clear.

81. Constructive: As to whether this amounted to a constructive dismissal, we find that it did and we get to that conclusion even when just reading the list of issues as drafted i.e. the respondent did commit a repudiatory breach of contract by demoting the claimant (Miss Meredith sought to widen the scope of the alleged breach in submissions). The contractual position was clear: the claimant was employed as a Project Commercial Director on a salary of £105,000 pa. That position was only terminable by the respondent on 3 months' notice.

82. The respondent's capability procedure did provide for the possibility of redeployment and demotion in the event of poor performance but only on conclusion of a thorough process. Even if the respondent is right that following that process would be inappropriate for an employee of the seniority of the claimant some sort of process following at least the basic principles of a fair procedure would be required before seeking to vary the contract to this effect.

83. The respondent followed no such procedure even in spirit. Critically the claimant was not formally given the opportunity, with advance notice, to respond to the concerns about his performance before the decisions to demote and reduce his pay were made. Accordingly those decisions were fundamental breaches of his contract of employment.

84. As to when those breaches took place, the claimant knew on 13 July that his job title would change and that his salary would be reviewed. At this point it must have been apparent to him that he was being demoted and that reduction in pay was very likely especially as he had received a significant increase in pay on being promoted to that role. The reduction in pay was confirmed by letter on 20 July and by that date he can have been in no doubt as to the fact of the breach.

85. We conclude that the claimant resigned from his employment because of that breach as expressly stated in his resignation letter. He did in that letter

also refer to Mr Galloway's conduct at the meeting on 26 July but in our view the primary cause of the resignation was the demotion.

86. There is a dispute between the parties as to whether the respondent, as a matter of pleading, is allowed to argue that the claimant waived that breach. In any event, even if the respondent can properly run such an argument we find that the claimant did not waive the breach. In the relatively short period between him becoming aware of the breach and his resignation it is clear that he was - quite reasonably - taking legal advice and therefore understood that the respondent could not unilaterally vary his contract. He plainly did not accept the breach and was trying to find an alternative way forward with the respondent by submitting a proposed alternative role. When it became apparent that his demotion was confirmed despite that proposal the meeting on 26 July developed as it did.

87. Accordingly the claimant was constructively dismissed.

88. As for the reason for that constructive dismissal, we deal below with whether it was the claimant's disability and conclude it was not. We conclude that the reason was what the respondent saw as the claimant's poor performance i.e. capability. It was very plainly not redundancy. All the contemporaneous documents point to performance as well as the discussions between the parties on Mr Galloway's own evidence. To argue otherwise is at best hopeless and ill-informed.

89. That being the case, we conclude that the constructive dismissal for capability was unfair given that no appropriate process was followed and no opportunity given to the claimant to defend himself before the decision was made.

90. As to whether compensation payable to the claimant for that unfair dismissal should be reduced we conclude:

    a. There was no contributory conduct on his part to justify such a reduction. There was no wilful poor performance on his part prior to the meeting on 26 July. The respondent also relies on his failure thereafter to respond constructively to their correspondence and the offer to retract the demotion. Given the terms of that correspondence - saying that it was a redundancy situation and inviting him in for consultation accordingly - it is wholly understandable why the claimant did not so respond.

    b. If the respondent had followed an appropriate procedure regarding the claimant's perceived poor performance we conclude that that would in all the circumstances have been more than likely to result in a demotion. The claimant may well have then still resigned but if the process was done properly, that would not have amounted to an unfair dismissal. We wish to explore further with the parties at the remedy hearing the implications of that finding on compensation payable.

91. Breach of contract

92. Bonus: The terms of the bonus scheme out in the claimant's service agreement are clear and unambiguous. Any bonus payable pursuant to clause is 'purely discretionary' and the employee has no right to it if his employment terminates or he is under notice of termination at or before the date when the bonus might otherwise have been payable - a very usual contractual term in relation to bonuses.

93. The claimant also had the benefit, however, of the additional bonus specifically set out in the letter dated 12 December 2016 with regard to Bedford Square. The terms of that letter are also clear and unambiguous expressly stating that it was a 'special personal incentive and bonus scheme' and the condition for payment of the bonus was 'being an employee for the conclusion of the project in all aspects and on achieving' certain profit margins.

94. The potential ambiguity arises from how those two schemes sit alongside each other. The service agreement terms clearly do refer to 'any' bonus payment and, in clause 9.3, to 'a' bonus which suggest the references are general. The 12 December letter, however, by describing the bonus as 'special' and 'personal' and stating qualification to be based on being an employee 'for the conclusion of the project in all aspects' naturally reads as overriding the more general terms of the service agreement. Accordingly, the exclusion of qualification if the employee is not employed or is under notice of termination at the time of payment would not apply.

95. The question then is whether the claimant was an employee at the conclusion of the project in all aspects and if so what level of profit was achieved. As to the first question, it is clear from Mr Dart's note of the meeting on 13 July 2018 that at that point the respondent regarded the project as concluded and further confirmed in the letter dated 20 July 2018 that the bonus was payable.

96. The claimant was therefore an employee at the time of the conclusion of the project and is entitled to a bonus payment in the sum of £24,000.

97. Notice pay: the claimant's letter of resignation was silent as to whether it was with immediate effect or he was giving three months' notice as required under his contract. Mr Dart replied expressly indicating that the respondent deemed the resignation to be effective with effect from 1 August. Neither the claimant nor his solicitors, who both wrote to Mr Dart in reply, challenged that statement and accordingly our interpretation is that the claimant did resign with immediate effect and therefore he is not entitled to any payment in respect of his notice period.

98. Disability discrimination

99. Burden of Proof: in respect of all the discrimination claims we find that burden of proof does pass to the respondent given that the claimant has proved facts that show he was unfairly constructively dismissed.

100. Direct discrimination: as stated above the reason for the claimant's dismissal was the respondent's perception of his poor performance. The link between that performance and his disability is dealt with below in the 'arising from' claim. We do not find however that the disability was the reason why the claimant was demoted. It is clear that the reason in Mr Galloway's mind for the demotion was the performance issues and that these issues had first been identified by him significantly before he had knowledge of the disability.

101. Discrimination arising from disability: clearly the demotion, reduction in pay and dismissal all amounted to unfavourable treatment and were because of the claimant's poor performance (the 'something arising'). That performance was, at least to some degree, a consequence of the claimant's disability. Judge Khalil's decision on the preliminary issue of whether the claimant was disabled at the relevant time identified Dr Kimber-Rogal's report as compelling. In that report she expressly stated that not only can GAD interfere with job performance but in the claimant's case:

> 'For example, one of Mr Brackstone's key difiiculties is a very low sense of self-worth and a heightened sensitivity to criticism. This means that he is highly self-critical and that he will often take criticism from others very personally, whether intended that way or not.'

and

> 'Mr Brackstone's OCD tendencies manifest in his obsession with ensuring that all his work is completed to a rigorous, self-imposed standard. One which generally exceeds the expectations of others and almost always exceeds the efforts of his peers.
>
> Consequently he can take longer to complete tasks than his peers or than is perhaps expected by his colleagues or superiors. Mr Brackstone compensates for this impulse by working harder than his peers, seldom taking breaks during the working day, and by working very extended hours.'

and

> '…this behaviour has, in fact clearly actually led to misunderstandings and conflict in the working environment; particularly it would seem where, at times, his thoroughness and thus extended time commitment to tasks, has not been recognised or acknowledged by others involved.
>
> At such times Mr Brackstone feels even more personally attacked, and so his approach of withdrawing and rebelling becomes even more heightened. Thus a cycle of behaviour is instigated which is, to a large degree, self fulfilling and thus perpetuated.'

and

> 'In talking with Mr Brackstone, it is clear that he has a very sharp commercial mind, which is always trying to predict several steps ahead, much like playing a game of chess, and a great, sometimes obsessive, attention to detail. It is clear that this too feeds into his work and home life.
>
> At work it is another factor in the input/output time balance conundrum.'

102. It is also clear from the respondent's evidence that these tendencies as described by Dr Kimber-Rogal were responsible, if not wholly, for at least a

significant part of their performance concerns.

103. Mr Galloway's own evidence was that it was the claimant's personality and communication style that was causing the difficulty. Although he stated that neither of these had to do with his medical issues, Dr Kimber Rogal's report suggests otherwise. He also referred to the claimant's 'adversarial approach' generating difficulties which again accords with the report.

104. We conclude therefore that the claimant's disability did have a significant influence on the respondent's treatment of the claimant.

105. The respondent seeks to justify this treatment by saying that its actions were a proportionate means of achieving the legitimate aim of performance management of its employees. Clearly performance management is a legitimate aim. Whether the respondent approached that exercise proportionately is to be assessed objectively. There was undoubtedly a business need to manage genuine performance concerns regarding the claimant but there was an obligation on them to do that in a fair and appropriate way not least by following a process. Once they knew the claimant's diagnosis and knew that he was having counselling, apart from encouraging him to attend the counselling and not work too hard, they did not take any proactive support steps to support him. For example, they did not seek any advice as to the nature of his condition nor his requirements. This was in stark contrast to their own disability policy. Further, after they became aware of the diagnosis it was the claimant who always had to chase for a 'catch up' to take place.

106. In these circumstances and in particular taking into effect the discriminatory effect of their treatment on the claimant, the justification defence is not made out and the claim of discrimination arising from disability succeeds.

107. Reasonable adjustments: the PCPs relied on at issue 5.1(i) & (ii) are made out on the facts. As for the PCP at 5.1(iii), these acts were done but they did not amount to a practice. Even noting Mr Galloway's written evidence about the respondent's approach to career progression and the possibility that people may move up and down the company ladder, these events concerning the claimant were one off acts in response to a very specific situation.

108. As to whether the proved PCPs put the claimant at the claimed substantial disadvantages in comparison with persons who are not disabled, we find that they did. They clearly led to all of the substantial disadvantages claimed (we note that Dr Kimber-Rogal's report stated in terms that his condition had been significantly exacerbated by his treatment at work). Further, there was a clear disadvantage to the claimant in not applying the capability procedure - which provides specific protection for disabled employees - to him in comparison to a non-disabled employee as he would have benefitted from that protection. Further, the management style at the respondent - specifically not seeking advice either legal or medical with

regard to the claimant's condition - plainly put the claimant at a disadvantage not suffered by a non-disabled employee about whom such advice was not required.

109. The respondent cannot be responsible however for any breach of this duty flowing from issuing the formal warning as that was issued before they had the necessary knowledge of his disability.

110. The adjustments sought by the claimant at issue 5.3(i) & (iii) were plainly reasonable in all the circumstances however we find 5.3(ii) was not as there was insufficient evidence to show that the claimant not having enough time to complete work was part of the problem. Indeed, if anything, having more time would have simply allowed him to obsess over detail.

111. The breach of the duty to make reasonable adjustments claim is therefore made out in part.

112. <u>Remedy</u>

113. The matter is listed for a 2-day remedy hearing on 3 March 2021. A separate Order with directions for that Hearing has been made. The parties are encouraged, pursuant to rule 3 of the Employment Tribunal Rules of Procedure 2013, to seek to resolve the matter of remedy between themselves without the need for that Hearing to proceed.

____

Employment Judge K Andrews
Date: 21 December 2020

APPENDIX - LIST OF ISSUES

Direct disability discrimination

1. Did the Respondent treat the Claimant less favourably because of his disability:
    1.1. by demoting him;
    1.2. by reducing his pay; and/or
    1.3. by dismissing him?

Discrimination arising from disability

2. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability:
    2.1. by demoting him,
    2.2. by reducing his pay and/or
    2.3. by dismissing him?

The Claimant says the "something arising from disability" is his performance and/or the poor appraisal.

3. Did the Respondent know or could the Respondent reasonably be expected to know that the Claimant had the disability?

4. Can the Respondent show the treatment was a proportionate means of achieving a legitimate aim? The Respondent says that performance management was the legitimate aim.

Failure to make reasonable adjustments.

5. Did a Provision, Criterion or Practice (PCP) of the Respondent put the" Claimant (as a disabled person) at a substantial disadvantage in comparison with persons who are not disabled?
    5.1. The PCPs relied upon by the Claimant are:
        i. Failure to apply the Respondent's capability policy in relation to the alleged poor performance of the Claimant when the impact of his mental health issues on his performance should have been considered;
        ii. Subjecting the Clamant to the same management style applied to all able employees despite (it is alleged [but disputed by the Respondent]) knowing of his disability;
        iii. Demoting the Claimant, reducing his pay and/or dismissing him after becoming aware of his mental health problems and/or alleged performance issues
    5.2. The substantial disadvantages relied upon by the Claimant are:
        i. being unable to work in the same way as other employees;
        ii. the reduction in the Claimant's salary of £12,500;
        iii. his dismissal;
        iv. his General Anxiety Disorder was exacerbated;

v. a formal written warning was issued to the Claimant in relation to alleged performance issues;
vi. the Claimant's demotion.

5.3. The reasonable adjustments which it is alleged the Respondent should have made are:

i. Providing training and/or raising awareness for managers to adjust their management style for the Claimant;
ii. Providing reasonable periods of time for the Claimant to complete work;
iii. Seeking medical advice and considering adjustments to the Claimant's role or duties.

6. Did the Respondent know or could the Respondent reasonably be expected to know that the Claimant had the disability and was likely to be placed at the disadvantage?

7. If so, what steps was it reasonable for the Respondent to take to avoid the disadvantage?

8. Did the Respondent take them?

Unfair dismissal

9. Did the Respondent dismiss the Claimant?

10. Alternatively:

10.1. did the Respondent commit a repudiatory breach of contract by demoting the Claimant?
10.2. [did the Claimant leave because of the breach?] - subject to the Tribunal allowing the Respondent to contest the waiver point
10.3. [did the Claimant waive the breach?] - subject to the Tribunal allowing the Respondent to contest the waiver point

11. If the Claimant was dismissed was it for the potentially fair reason of capability or redundancy? Alternatively, was the Claimant dismissed because of his disability?

12. If the dismissal was potentially fair, was the dismissal reasonable? In particular:

12.1. Did the Respondent carry out a fair procedure, were the Respondent's conclusions as to the Claimant's capability within the band of reasonable responses and was it reasonable to dismiss due to the same;
12.2. Should the Respondent have warned and consulted about the proposed redundancy, adopted another basis for selection or offered suitable alternative employment to the Claimant?

13. If the dismissal was unfair, would the Claimant have been dismissed, or would there have been a chance of his dismissal occurring in any event? Should any award be reduced to reflect this?

14. Did the Claimant contribute to his dismissal? Should any compensation be reduced as a result?

Breach of contract

15. Did the Respondent act in breach of contract by failing to pay him a bonus which the Claimant contends he was entitled to receive? if so, how much was he entitled to receive?

16. Is the Claimant entitled to three months' notice pay which he did not receive?

Remedy

17. What compensation, including any injury to feelings, should the Claimant be awarded?

18. In particular:

    18.1 Is the Claimant entitled to £30,000 by way of contractual notice pay?

    18.2 In the event that the Claimant established breach of contract in relation to the Respondent's failure to pay the bonus referred to above, what sum is he entitled to?

19. Is the Claimant entitled to an uplift in the award of compensation as a consequence of the Respondent's alleged failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

20. Should a financial penalty be made against the Respondent pursuant to section 12A of the Employment Tribunals Act 1996?